(3)

No. 99-1490

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF SOUTH DAKOTA; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota; SCOTT PODHRADSKY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Petitioners,

v.

YANKTON SIOUX TRIBE, and its individual members; UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS STATE OF SOUTH DAKOTA, CHARLES MIX COUNTY AND SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT

TIMOTHY R. WHALEN
Counsel of Record
WHALEN LAW OFFICE, P.C.
P. O. Box 127
Lake Andes, SD 57356
(605) 487-7645

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37(4), the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae*, in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Five of the *amici* Cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown are located within the 1858 boundaries of the Yankton reservation. Every one of these Cities is situated, in whole or in part, on the former allotments now held in fee, that are squarely at issue here. Two of the *amici* Cities, Geddes and Platte, lie close to the 1858 boundaries. Each of the Cities has operated, since its founding a few years after the 1894 Yankton Act, as if no reservation boundaries exist.

The vital concern that prompts the filing of this *amici curiae* brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, a large portion of the area of Charles Mix County, South Dakota, including, in whole or in part, the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue. Consequently, the approximately 6,000 people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation.

Here, ninety percent (90%) of the land is owned by non-members and over two-thirds (2/3) of the residents are non-members who reside on small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia, and Wagner. In all, there are forty-nine (49) political subdivisions within the county.

The expectations of the people in this area should not be lightly regarded or simply set aside. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356-357 (1998). Nevertheless, the United States

has consistently ignored this prudential consideration. For these reasons, the issue is of grave importance to the residents, the Cities and the other units of local governments in Charles Mix County, South Dakota.

It is profoundly disturbing that reservation status is even a possibility after this Court unequivocally rejected the argument of the Yankton Sioux Tribe and United States that would have resurrected the 1858 reservation boundaries in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (*Yankton I*). This *amici curiae* brief of the Cities will focus on the role that the relentless advocacy of the United States has played in this process in this case, and in other similar cases.

Importantly, the United States did not even file a Petition for Certiorari in this case when it was due on May 2, 2000. This recent development is especially noteworthy in light of the fact that on remand, the United States was granted leave to intervene as a plaintiff in this litigation. The arguments the United States submitted thereafter caused additional conflict and confusion.

Clearly, the United States does not consider that the rejection of the arguments submitted by the United States and the Yankton Sioux Tribe in the court of appeals, present this Court with a question that is certworthy. This is a significant concession by the United States even if the United States subsequently supports, in any fashion, the Petition filed by the Yankton Sioux Tribe.

Moreover, although the *amicus curiae* brief that follows, for the most part, was drafted prior to the recent decision of the United States to not file a Petition in this case, it is still significant because it summarizes the advocacy of the United States in cases of this kind and sheds light on the unprecedented nature of this decision of the United States. The argument also provides a perspective from which any subsequent submission by the United States in this case

should be viewed. All of this further supports the Petition for a Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District.

SUMMARY OF ARGUMENT

The Cities fully support the position set forth in the Petition for Writ of Certiorari of the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District. Pet. for Writ of Cert., *South Dakota v. Yankton Sioux Tribe*, No. 99-1490, (Mar. 7, 2000). The Cities agree that the decision of the panel conflicts squarely with the relevant decisions of the Supreme Court of the State of South Dakota and this Court.[1] This brief will address the role of the United States in the entire process.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Solem v. Bartlett*, 465 U.S. 463 (1984), *Hagen v. Utah*, 510 U.S. 399 (1994) and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), clearly undermines the continuing reservation status of the Yankton reservation recognized by the panel. Petitioners highlight these important principles and, for that reason, they will not be repeated here.

However, a proper perspective regarding the history of this disestablishment litigation before this Court is also important in order to accurately assess the Petitions in conjunction with the principles set forth in these decisions. This brief is intended to serve that purpose and provide that perspective.

---

[1] *Bruguier v. Class*, 599 N.W.2d 364 (S.D.1999). In this light, the Cities further agree that something less than full plenary attention may be appropriate in this instance. *See* Pet. for Writ of Cert., 3 n.2, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490).

In *Yankton I*, Charles Mix County reviewed the primary arguments presented and rejected in each reservation boundary case decided by this Court, as well as the historic perspective available or established at the time. Br. of Charles Mix County, South Dakota in Supp. of Pet'r, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581). For the convenience of the Court, the Cities have reproduced that brief in the Cities' appendix. *See* County Brief, Cities App. 1a-33a. To complete the perspective, the Cities have also reproduced every brief and oral argument that the United States has submitted in this Court in these cases. Cities App. 34a-189a, 233a-272a.

The County brief recounts in summary fashion the case by case developments in this litigation. *See* County Brief, City App. 6a-20a, 27a-29a. A review of this chronology establishes three overriding themes. First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States has never failed to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate the confusion and conflict in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are also closely examined for another reason. As will be seen, the United States has repeatedly made a number of important general concessions in this Court, subsequent to *DeCoteau*, regarding the *effect of cession agreements*, like this one, on Indian

reservations. These *general cession concessions*, made in conjunction with submissions that urged the continued recognition of other original reservation boundaries, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration. *See* chronology summarized in County Brief, Cities App. 15a-20a, 27a-29a. *See also* Briefs of United States, Cities App. 88a-189a, Tr. of Oral Arguments, Cities App. 250a-266a.

The County brief also addresses in chronological order, the *specific cession concessions* of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux cession act. *See* County Brief, Cities App. 20a-27a. For example, in 1984, the United States formally submitted this Yankton reservation disestablishment concession in the Eighth Circuit Court of Appeals. *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) *rev'd in part by, United States v. Dion*, 476 U.S. 734 (1986). *Id.* at 20a, 21a. The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Br. for the United States as *Amicus Curiae* Supp'g Resp't, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253).

Moreover, in other litigation also pending at the same time, and also dealing with the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux cession act, the United States acknowledged that this Court's decision in *DeCoteau* involved "a similar and contemporaneous cession agreement" with "the same language" and "purpose." Br. for the United States, *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986), Cities App. 199a, County Brief, Cities App. 26a-27a. Significantly, Article XVIII of the 1894 act that the United States insisted was so important in *Yankton I*, was not mentioned in any of this. Act of August 15, 1894, 28 Stat. 286, 318.

To complete the perspective, the Cities review the briefs and oral argument the United States submitted in *Yankton I*. The Cities have appended the Briefs of the United States and excerpts from the transcripts of the oral argument of the United States in *Yankton I* that highlight the inconsistencies in the position of the United States. Cities App. 202a-232a, 266a-272a. Further, the Cities review the analysis this Court set forth in *Yankton I* that squarely rejected the position of the United States. Finally, the Cities track the argument of the United States since that time and the manner in which the courts below have mistakenly relied upon the representations of the United States in the process of deciding this case.

Because the United States sought an extension of time in two separate instances in this Court, until May 2, 2000, we did not really know what position the United States would ultimately adopt before this Court in this litigation. We now know that the United States will not file a Petition for Certiorari in this Court. Clearly, this is a significant concession.

Past experience suggests that the United States will eventually support whatever argument the Yankton Sioux Tribe chooses to advance. Of course, we could be pleasantly surprised, but nothing in the arguments submitted to date by the United States would support that supposition.

One thing is fairly certain. The United States will not honor the position advanced by the Office of the Solicitor General in this Court in *Yankton I* (i.e. that disestablishment was inevitable if the argument of the United States regarding Article XVIII was rejected and the 1858 Yankton boundaries were not recognized by this Court, because *nothing* in the Yankton documentation supported any other conclusion.) Brief for United States, Cities App. 202a-232a; Tr. of Oral Argument at 270a-271a, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581), Cities App. 266a. This Court in *Yankton I* did

reject the argument of the United States and the 1858 reservation boundaries were not recognized.

Nevertheless, within days of the *Yankton I* decision, the United States reneged on the inevitable disestablishment argument it presented to this Court, even before the case was remanded to the district court. Since then, the United States has adopted several other conflicting arguments to continue supporting the position of the Yankton Sioux Tribe that the 1858 reservation boundaries should be resurrected. And the fact that the United States has decided not to file a Petition for a Writ of Certiorari does not change any of this.

At some point in time, the "litigating position" of the United States in this type of case should be subject to heightened scrutiny. *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993). *See also Washington v. Yakima Indian Nation*, 439 U.S. 463, 477-478 n.20 (1979) ("[United States] recently changed its position diametrically").

In this regard, the fact that this Court did not extend an invitation to the United States to express the views of the United States at the petition stage in *Yankton I* is hopefully of some significance. The rejection of the position of the United State in *Yankton I* also merits special notation. And clearly, the conflicting arguments the United States has submitted since that time further substantiate the claim that no principled reason exists to give any special credence to the position of the United States in cases of this nature.

ARGUMENT

I. THE SHIFTING ARGUMENTS OF THE UNITED STATES ARE WITHOUT MERIT.

A. Nothing In The Yankton Documents Indicated That Article XVIII Of The 1894 Act Was Intended To Alter The Fundamental Attributes Of The Yankton Cession.

MR. MANN: Well, the language in *DeCoteau* said that the Indians cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in the land in question, and the statute in *Rosebud* stated that the Indians cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all the land in question.

It would be rather difficult, I think, to construe that language as language that allowed the Indians to retain sovereignty over the land.

QUESTION: I think you're probably right. . . .

Tr. of Oral Argument at 25, *Hagen*, (No. 92-6281), Cities App. 263a-264a (emphasis added).

In *DeCoteau*, the United States argued against cession disestablishment and lost. After the decision of this Court in *DeCoteau*, even the United States repeatedly acknowledged that Congress routinely intended cession statutes such as the Yankton cession to disestablish reservation areas. Brief of United States, Cities App. 88a-189a. Before *Yankton I*, the United States did not attempt to circumvent the holding in *DeCoteau* regarding this type of cession, openly acknowledging, as in *Hagen*, that it would be "rather difficult" to support any other construction. *Id.* at 263a-264a.

In *Yankton I*, the United States ignored *DeCoteau* and that traditional cession analysis and advocated the "narrower" position ultimately adopted by the Court of Appeals in

Yankton I. Yankton Sioux Tribe v. Southern Missouri Waste Dist., 99 F.3d 1439, 1448, 1457 (8th Cir. 1996).

Nothing of substance could be cited by either the United States or the panel majority in *Yankton I* to support this anomalous and otherwise "rather difficult" construction. Brief for United States, Cities App. at 32a. Moreover, the prior views of the United States, summarized above, precluded this "narrower" view--at least in the absence of some *affirmative* evidence of congressional intent to the contrary. In this respect, generic arguments loosely tied to the Article XVIII savings clause should not have sufficed. Article XVIII was not intended to alter the fundamental attributes of the Yankton cession--and not a single word in any of the Yankton documentation supported the position of the United States. Nevertheless, the court of appeals was persuaded by the argument of the United States.

This Court in *Yankton I* unanimously rejected the Article XVIII savings clause argument of the United States. First, the Court noted that the holding of the court of appeals keyed on this circuitous argument:

> The court relied *primarily* on the saving clause in Article XVIII, reasoning that, given its "unusually expansive language," other sections of the 1894 Act "should be read narrowly to minimize any conflict with the 1858 treaty." *Id.*, at 1447.

Yankton I, 522 U.S. at 342 (emphasis added).

This Court then disposed of the argument in no uncertain terms:

> The United States urges a similarly "holistic" construction of the agreement, which would presume that the parties intended to modify the 1858 Treaty only insofar as necessary to open the surplus lands for settlement, without fundamentally altering the treaty's terms.
>
> Such a literal construction of the saving clause, as, the South Dakota Supreme Court noted in *State v. Greger*,

> 559 N.W. 2d 854, 863(1997), would "impugn the entire sale.". . . .
>
> Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status. . . .
>
> Rather than read the saving clause in a manner that eviscerates the agreement in which it appears, we give it a "sensible construction" that avoids this "absurd conclusion.". . .

Yankton I, 522 U.S. at 345, 346.

The sensible construction adopted by the Court in *Yankton I* reflects the traditional cession analysis set forth in *DeCoteau*.

B. The Cession Concessions Of The United States In *Yankton I* With Reference To Disestablished Reservation Boundaries Are Significant And Controlling Here.

In the process of advancing the Article XVIII savings clause argument, the United States conceded that but for the presence of Article XVIII, the 1894 Yankton act would have disestablished the 1858 Yankton reservation in the traditional sense recognized by this Court in *DeCoteau*. In oral argument, the United States, in response to direct questions from this Court, described that process in the following manner:

> QUESTION: Now this—this is a *totally* checker boarded situation?
>
> MS. MCDOWELL: That's correct, And this Court—. . . .
>
> MS. MCDOWELL: Well, the Court in DeCoteau, found total diminishment. But that was a different case, in several respects, from this one. In the first place, of course, there was no savings clause preserving rights under an earlier treaty. . . .

QUESTION: But do you—do you agree with both counsel, it seemed to me, that the choice is either we accept your argument based on Article XVIII or there's a diminishment?

MS. MCDOWELL: That's correct.

QUESTION: That there is no such thing as diminishment applicable on these facts?

MS. MCDOWELL: That's correct. Diminishment seems to be limited to cases such as Roseboud, where there was a selling or a ceding of a part of the reservation in so many words, as opposed to this sort of situation

Tr. Oral Argument, *Yankton I*, Cities App. 270a-271a. (emphasis added).

The totally checker boarded situation or "total diminishment" holding of the Court in *DeCoteau* (in the words of the United States), resulted from the extinguishment of the reservation boundaries by the act at issue there. *DeCoteau*, 420 U.S. at 427 n.2, 446-447. Also, as the United States further conceded in response to the last question from this Court, the Yankton cession was not a diminishment where there was only a "ceding of a *part* of the reservation" ("as *opposed* to this sort of situation"). *Id.* (emphasis added). The Yankton cession was a cession of *all* of the reservation that was not allotted. On these facts, diminishment in the sense of maintaining any portion of the 1858 reservation boundary was not possible, as the United States conceded.

For this reason, the entire 1858 reservation boundary was within the scope of the cession in *Yankton I*. In this respect, the rejection of the Article XVIII savings clause argument of the United States by this Court resulted in the extinguishment of the 1858 reservation boundary, "total diminishment" of the 1858 Yankton reservation. The United States clearly conceded the point.

C. This Court Has Made Clear That The 1858 Reservation Boundaries Of The Yankton Reservation Were Not Maintained.

> The 1894 Act is also readily *distinguishable* from surplus land Acts that the Court has interpreted as *maintaining reservation boundaries*. . . . The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the *existing reservation boundaries were maintained*. . . . [W]e *conclude* that the saving clause pertains to the *continuance* of annuities, *not the 1858 borders*.

Yankton I, 522 U.S. at 345-347 (emphasis added).

The Cities do not disagree with the argument in the Petition that the manner in which this Court in *Yankton I* treated the operative cession language should be controlling in resolving this case. In fact, as a practical matter, a fair reading of *Yankton I* and other precedent of this Court almost mandates this conclusion.

In order to simplify the issue, however, the Cities have approached the question of reservation disestablishment in this *amici curiae* brief from a different perspective, although the end result is still the same. *We have focused directly on this Court's discussion of the 1858 reservation boundaries.* The Cities specifically address the shifting position of the United States with reference to that discussion and to the holding of the district court *reinstating* the 1858 reservation boundaries. All of this clearly establishes that the decisions of the district court and the Eighth Circuit Court of Appeals are both erroneous.

1. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998)

(a) As a preliminary matter, it is logical to focus on the 1858 reservation boundaries because that is the manner in which cession precedent has been traditionally understood. In other words, if a cession removed lands from a reservation, it did so by extinguishing the reservation boundaries around

the area affected. *For decades, every court in every case, every federal Indian law text, every historian and every commentator that reviewed this precedent have agreed on this fundamental point.*

In this case, the United States can not cite a single example to the contrary. On the other hand, references to support this understanding are commonplace. As early as 1975, even the title of a note in the North Dakota Law Review reflected this understanding; INDIANS-RESERVATIONS-JURISDICTIONAL EFFECT OF SURPLUS LAND STATUTE UPON *TRADITIONAL BOUNDARIES* OF AN INDIAN RESERVATION. James M. Bekken, Comment, *Indians—Reservations—Jurisdictional Effect of Surplus Land Statute Upon Traditional Boundaries of an Indian Reservation*, 52 N.D. L. Rev. 411, 417 (1975) (emphasis added).

In the text of the note, the analysis is directed to the effect of surplus land statutes on reservation boundaries. For example, in the discussion of *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (the cession this Court in *Yankton I*, 522 U.S. at 344, described as "parallel" to the Yankton Act) the law student structured the statement of the issue in boundary terms:

> *DeCoteau* has clearly shown that to determine the effect a particular statute had on reservation *boundaries* the court must. . . .

Bekken, *supra* at 418 (emphasis added).

This concentration on the extinguishment of reservation boundaries is also routinely acknowledged even by tribal advocates who disagree with reservation disestablishment. For example, see the "boundaries" discussion throughout Susan D. Campbell, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 Am. Ind. L. Rev. 57, 58, 63, 64, 71, 75, 96 (1984).

(b) With the extinguishment of reservation boundaries, it has also followed, *a fortiori*, that the Indian country

remaining in the affected area, if any, would be either dependent Indian communities under 18 U.S.C. § 1151(b) or Indian trust allotments under 18 U.S.C. § 1151(c). *Every court in every case, every federal Indian law text, every historian and every commentator are also in agreement in this instance.*[2]

In 1914, this Court made this point clear in *United States v. Pelican*, 232 U.S. 442 (1914) with respect to Indian trust allotments. In this situation, allotments subsequently held in fee (the primary issue here) are no longer "Indian country." *Pelican* was codified in 18 U.S.C. § 1151(c).[3]

Moreover, a recognition that this Court expressly held that the 1858 reservation boundaries were extinguished by this cession for a sum certain is not in any way inconsistent with the fact that the Court specifically reserved the question of whether the reservation was disestablished altogether. *Yankton I*, 522 U.S. at 358. That entirely distinct issue must still be decided in this case.

For these reasons, the Cities respectfully submit that this Court intended that the subject of the remand would be limited to the "reservation status" of only existing trust allotments, dependent Indian communities, and other trust lands. When reservation boundaries are extinguished, this would ordinarily be the case. See the reference in *Yankton I* to "conflicting understandings about the status of the reservation" and the "fact that the tribe continues to own land

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[2] In the court of appeals, even the United States, in the alternative, finally acknowledged the legitimacy of this analysis. Br. of Plaintiff-Intervenor/Appellee United States of America at 26 n. 3, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900).

[3] This Court recently reaffirmed and explained the analysis and codification of *Pelican* in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 528-529 (1998). *See also DeCoteau*, 420 U.S. at 427 n.2, 446-447, *Rosebud*, 430 U.S. at 586, 601 n.24, 613-615 n.47, 615-616 n.48.

in common." *Yankton I*, 522 U.S. at 358. These contentions do not directly implicate the status of fee lands, which are predominantly owned and populated by non-members. *See Yankton I*, 522 U.S. at 356-357.

In other words, *Yankton I* clearly resolved the status of the 1858 reservation boundaries. *See Yankton I*, 522 U.S. at 333, 343, 345, 345-346, 347, and 353.

Because of the law of the case, the 1858 boundary issue should not have even been addressed in this remand.

All else aside, this Court made clear in *Yankton I* that the 1858 "reservation boundaries" were *not* "retained" or "maintained"—"we *conclude. . . continuance* of annuities, *not the 1858 borders*." *Id.* at 347 (emphasis added). At the very least, the Court decided that question. The Court stated that the "case" presented the question of whether "Congress *diminished the boundaries*" of the Yankton Sioux Reservation. *Id.* at 333 (emphasis added). The unresolved issue, as the Court also clearly stated, was "whether Congress disestablished the reservation altogether." *Id.* at 358. That issue should not have involved resurrecting the status of 1858 reservation boundaries.

2. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) *rev'd* 188 F.3d 1010 (8th Cir. 1999) *petition for cert. filed* (U.S. Mar. 7, 2000) (No. 99-1490).

The district court ignored all of the above and simply held that even after Yankton I, the 1858 reservation boundaries were still intact. Yankton II, 14 F.Supp.2d at 1143. ("If the original exterior boundaries remain, as it appears they do from the Supreme Court's opinion"). *See also Yankton II*, No. 98-4042 (D.S.D. Oct. 5, 1998) (order denying motion for new trial at 3) ("The Court has now held that the remaining lands *within the 1858 boundaries* remain a part of the Yankton Sioux Reservation"). The district court was clearly mistaken (for the second time).

The strength of that conclusion is further supported by an express concession of the United States in the remand in June, 1998. At that time, the *United States conceded, in the district court, that this Court in Yankton I recognized that Congress did not intend to maintain the 1858 reservation boundaries:*

> [T]he United States Supreme Court found the savings clause *insufficient to maintain the reservation boundaries of the 1858 Treaty* here, and thus did not prevent diminishment of the Reservation. . . .

Summ. J. Br. for the United States at 22 n. 5, *Yankton II*, 14 F.Supp.2d 1135 (D.S.D. 1998) (No. 98-4042) (emphasis added). *See also* Summ. J. Br. for the United States at 2, 5, 6. Nevertheless, the United States made other arguments in support of the position of the Yankton Sioux Tribe.

After the district court recognized the 1858 reservation boundaries in *Yankton II*, the United States never again mentioned this extinguished boundary concession or the manner in which the holding of the district court conflicted with the express language of this Court in *Yankton I*.

3. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) *petition for cert. filed* (U.S. Mar. 7, 2000) (No. 99-1490).

(a) In their brief to the court of appeals, the United States avoided any discussion of the express conflict between the holding of the district court and the conclusion of this Court in *Yankton I* regarding the 1858 reservation boundaries. As a result, the brief for the United States did not affirmatively support the tribal claim that the district court was correct in concluding that the 1858 reservation boundaries still exist.

The only reference that even indirectly addresses this aspect of the 1858 boundaries issue appears in the conclusion of the brief of the United States. The United States concluded:

> The Yankton Sioux Reservation continues to exist in *diminished form*, encompassing the unceded lands under

> the 1894 Act. The language of the 1894 Act, the legislative and negotiation history, and other surrounding circumstances *support diminishment*. . . .

Br. of Plaintiff-Intervenor/Appellee United States of America at 52, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900) (emphasis added).

The United States never explained how the Yankton reservation could exist in this "diminished form" nor exactly what the United States meant by "diminishment" (except, of course, to claim the "diminished form" *encompasses all unceded land*). However, one thing is perfectly clear. This "diminished form" argument conflicts with *everything* the United States told this Court in *Yankton I*. *See* the "total diminishment" discussion *supra*.

According to the United States in *Yankton I*, nothing in the Yankton documentation supported diminishment in any form whatsoever. For example, in the court of appeals in *Yankton I*, the views of the United States mirrored those of the Yankton Sioux Tribe with respect to the *lack of any evidence to support changed, altered, or diminished reservation boundaries*:

> The 1892 Agreement, the ratifying Act, and other legislative and historical evidence do *not* indicate an intent by Congress to diminish or disestablish the Reservation.

Br. for United States as *Amicus Curiae* in Supp. of Plaintiffs-Appellees at 3, *Yankton I*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) (emphasis added). *See also id.* at 4, 5, 8-15.

Significantly, in this Court in *Yankton I*, the United States, as *amicus curiae*, again agreed with this aspect of the historical record:

> But there was *no discussion* of whether the Agreement, if ratified, would alter the boundaries of the Reservation.
>
> *Solicitor Cohen notes . . . Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation* . . . .

Br. for the United States as *Amicus Curiae* Supporting Resp'ts at 5, 25, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581), 206a, 226a, (emphasis added). Cities App.

The court of appeals viewed the argument to recognize the Yankton reservation in the form resurrected by the district court in light of all of the above. In addition to the opinion of this Court, all *Yankton I* briefs and related documents were made part of the record in *Yankton II*. Moreover, in oral argument members of the panel in the court of appeals in *Yankton II* expressly referenced the transcript of oral argument in this Court in *Yankton I* directed to the scope of the cession.

In this instance, the United States could not convince the court of appeals to affirm the holding of the district court. *Instead, the court of appeals expressly confirmed that the 1858 reservation boundaries were extinguished by the 1894 Yankton act. See Yankton II*, 188 F.3d at 1020-1021, 1030.

This part of the conclusion of the court of appeals is clearly correct. For this reason, nevertheless, the United States will probably attempt to skirt this issue again and not directly address the status of the 1858 reservation boundaries. If the United States repeats the argument in this Court in support of the holding of the district court, its submission will not contain any direct reference to the status of the 1858 reservation boundaries. Instead, the United States will advance some other argument that otherwise generally supports the holding of the district court. The failure of the United States to specifically address the status of the 1858 reservation boundaries undermines the position of the United States.

(b) In other respects, the holding of the court of appeals is fundamentally flawed. With specific reference to the diminished reservation, the holding of the court of appeals is suspect for several reasons. First, as even the Yankton Sioux Tribe noted in its application for a stay, the court of appeals

has adopted a "third" option. Mot. for Stay Pending Pet. for Writ of Cert., *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (No. 98-3893, 3894, 3896, 3900). Importantly, no one, including the United States, argued that this third option was supported by anything in the *Yankton* documentation. Moreover, no one even suggested that the third option was a possibility in the district court or the court of appeals. As a result, the third option issue was not briefed or argued in either the district court or the court of appeals.

Importantly, the Yankton Sioux Tribe agrees with Petitioners that the "third option" holding of the court of appeals appears to be "inconsistent with all prior Supreme Court cases." *Id.* at 1-2.

> The parties to this appeal argued in their petitions for rehearing that prior Supreme court cases allowed for two possible resolutions to the captioned appeal [1858 reservation boundaries in tact or extinguished]. The circuit decision creates a third option, which appears to be *inconsistent with all prior Supreme court cases*. Whether the Supreme Court will approve this third option is *clearly a substantial issue*.

Id. at 1-2 (emphasis added).

Although the Cities disagree with the Tribe on the reason for the inconsistency, whether this Court eventually agrees with the Tribe (1858 reservation boundaries intact) or with the Petitioners, State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District (1858 reservation boundaries extinguished) is really beside the point at this stage in the proceedings. The important fact is that the parties agree that the "third option" holding of the court of appeals is inconsistent with precedent from this Court; the parties further agree that this inconsistency presents this Court with a substantial question.

Moreover, the "diminished form" of the Yankton reservation now recognized by the court of appeals in *Yankton II*, also conflicts with the testimony of both of the

expert witnesses for the United States in district court in *Yankton II* (these were the *only* witnesses to testify). And the recently adopted litigation position of the United States that boldly asserts that the Yankton legislation is truly "unique" adds nothing to the credibility of this position. Br. of Pl.-Intervenor/Appellee United States of America at 10, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900). The Yankton documentation also squarely refutes this notion. See the discussion in the Southern Missouri Waste Management District brief under subheading I-A, "A SUMMARY OVERVIEW ESTABLISHES THAT THE CONGRESSIONAL PROCESS FOR THE YANKTON ACT FOLLOWED A STANDARD OPERATING PROCEDURE" at 7-12, Br. for Southern Missouri Waste Management Dist. at 7-12, *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900).

D. The Fact That The United States Has Decided Not To File A Petition Is Important.

This is a significant concession. In light of the nature of the advocacy set forth *supra*, this concession further supports the Petition for a Writ of Certiorari filed by the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District.

CONCLUSION

For the foregoing reasons, and those stated in the Petition of the State of South Dakota, Charles Mix County and Southern Missouri Waste Management District, that Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TIMOTHY R. WHALEN
Counsel of Record
WHALEN LAW OFFICE, P.C.
P. O. Box 127
Lake Andes, SD 57356
(605) 487-7645

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